Supreme Court, U.S.
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No. 94-1056

In The

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona Corporation; KALISPELL FEED AND GRAIN, INC., an Arizona Corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually,

Petitioners,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Corporation, et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners acquiesced in the standard of review the Ninth Circuit applied in reversing the district court's denial of Respondent's motion for judgment as a matter of law:

   (i) By arguing on the merits that the district court's denial of Respondent's motion was not error when tested by the standard of review applied by the Ninth Circuit; and

   (ii) By failing to challenge the Ninth Circuit's standard of review in Petitioners' petition for rehearing, thereby depriving the Ninth Circuit of an opportunity to address Petitioners' contention that it applied an inappropriate standard of review.

2. Whether the standard of review applied by the Ninth Circuit in reversing the district court's denial of Respondent's motion for judgment as a matter of law was proper and consistent with Ninth Circuit and Supreme Court precedents.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Norwest Bank Kalispell, N.A., is a national association. Norwest Corporation is the direct owner of 97.15% of Norwest Bank Kalispell, N.A. Norwest Corporation is a Delaware corporation and a bank holding company.

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INTRODUCTION

Petitioners' Writ of Certiorari should be denied because the standard of review applied by the Ninth Circuit in reversing the district court's denial of Respondent's motion for judgment as a matter of law is consistent with the standard of review endorsed by this Court and applied by the other Circuits. The decision therefore did not create a conflict between the Circuits. In addition, the decision neither involved a federal question nor constituted a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Accordingly, the Petition for Writ of Certiorari should be denied. *See* Sup. Ct. R. 10.

STATEMENT OF THE CASE

Petitioners seek a Writ of Certiorari to challenge the Ninth Circuit's memorandum disposition[1] (Petitioners' Brief at A-1-10) reversing the judgment of the district court based upon its error in denying Respondent's motion for judgment as a matter of law on Petitioners'

[1] The Ninth Circuit's memorandum disposition was made pursuant to 9th Cir. R. 36-3 (Petitioners' Brief at A-3): "Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

two state law tort claims and award of attorney's fees to Petitioners. (Petitioners' Brief at A-4).

The Ninth Circuit applied the following standard of review:

> We review denial of a motion for judgment as a matter of law *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992). Our role is the same as the district court's. *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399 (1992). A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Erickson*, 960 F.2d at 804. The evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in favor of that party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986). (Petitioners' Brief at A-4).[2]

In its Petition for Rehearing (Respondent's Brief at App. 1), Petitioners challenged the Ninth Circuit's memorandum disposition on the grounds that the Ninth Circuit:

> "(1) Overlooked a material point of law, which led it to ignore Plaintiffs' evidence of concealment of material fact; [and]

---

[2] This articulation of the standard of review is not substantively different than that applied by the district court (see Petitioners' Brief at A-12).

> (2) Created a conflict with another decision of this [Ninth Circuit] Court which was not addressed in the Panel's opinion." (Respondent's Brief at App. 4).

Petitioners' Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because Petitioners Acquiesced in the Ninth Circuit's Standard of Review.

Petitioners' principal merits challenge to the Ninth Circuit's memorandum disposition was evidentiary (Respondent's Brief at App. 13-17). That challenge concluded:

> "The jury's verdict, when based upon substantial evidence as it was here, *must* be given deference by this Court." (Respondent's Brief at App. 17) (emphasis in original).

Nowhere in Petitioners' Petition for Rehearing did they challenge the standard of review applied by the Ninth Circuit in reversing the district court's denial of Respondent's motion for judgment as a matter of law. Thus, Petitioners acquiesced in the standard of review applied by the Ninth Circuit, and may not now seek

certiorari on the ground that a different standard of review should have been applied.[3]

II. Certiorari Should Be Denied Because The Ninth Circuit's Standard of Review Was Proper.

The Ninth Circuit's memorandum disposition (Petitioners' Brief at A-4), as well as the *Coddington*[4] and *House of Stuart*[5] Ninth Circuit dispositions (see Petitioners' Brief at 11-12), relied on a common articulation of the Ninth Circuit's standard of review found in *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992).[6] The so-called "substantial evidence" standard is bottomed on the proposition that it "is error to deny a

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[3] If a party chooses to file a petition for rehearing, Rule 40(a) requires that the petition raise each and every challenge to the decision in question. Fed. R. App. P. 40(a) (a petition for rehearing "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present"). This interpretation of Rule 40(a) is consistent with considerations of judicial economy, as well as with the purpose of a petition for rehearing. *Martin Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906) (" . . . petitions for rehearing . . . are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors.") (citations omitted).

[4] *Coddington v. Wabash Life Ins. Co.*, 1994 U.S. App. Lexis 1926 (9th Cir. Jan. 26, 1994), *cert. denied*, 63 U.S.L.W. 3262 (1994).

[5] *House of Stuart, Inc. v. Whirlpool Corp.*, 1994 U.S. App. Lexis 22199 (9th Cir. Aug. 15, 1994).

[6] It is worth noting that the unsuccessful certiorari petitions in *Erickson* and *Coddington* included challenges to the standard of review applied by the Ninth Circuit. (See *Erickson* Cert. Pet., p. 28 (issue 3), *Coddington* Cert. Pet., p. 11 (issue 1)).

judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." (*Id.*). The substance of that standard was applied by the district court (Petitioners' Brief at A-12) and the Ninth Circuit (Petitioners' Brief at A-4).

In the Ninth Circuit "substantial evidence" is not a quantitative concept. Instead it is based upon the Supreme Court's definition in *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938):

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

(Quoted in *Butte Copper & Zinc Co. v. Amerman*, 157 F.2d 457, 458 (9th Cir. 1946); see *Gordon Mailoux Inter. v. Fireman's Ins. Co. of Newark, N.J.*, 366 F.2d 740, 741 (9th Cir. 1966)).

The Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) observed that the summary judgment standard of Fed. R. Civ. P. 56 (c) "mirrors the standard for a directed verdict" under Fed. R. Civ. P. 50(a):

> " . . . the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. [citation omitted] If reasonable minds could differ as to the impact of the evidence, however, a verdict should not be directed." (477 U.S. at 250-251).

The Supreme Court in *Anderson* went on to state the two "mirror" standards:

> " . . . the judge must ask himself not whether he thinks the evidence unmistakenly favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury reasonably could find for the plaintiff." (477 U.S. 252).

Applying such a standard of review, the Ninth Circuit concluded that the evidence at trial was "insufficient to support the finding of negligent misrepresentation" (Petitioner's Brief at A-4) and "insufficient to support his [Martin's] constructive fraud claim." (Petitioners' Brief at A-10).

CONCLUSION

A comparison of the articulations of the applicable standard of review in the pertinent Ninth Circuit decisions, the memorandum disposition here, and the Supreme Court's teachings in *Anderson* establishes the absence of any worthy issue for review by the Supreme Court in this case.

December 30, 1994

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-36713

JOHN W. MARTIN CONSTRUCTION COMPANY, INC. an Arizona Corporation, et al.,

Plaintiffs and Appellees,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Association,

Defendant and Appellant.

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

On Appeal From the United States District Court
For the District of Montana

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INTRODUCTION

Plaintiffs deserve a rehearing because the Panel assigned to this case committed a gross error of law when it reversed Plaintiffs' jury verdict.

The Court:

(1) Overlooked a material point of law, which led it to ignore Plaintiffs' evidence of concealments of material fact;

(2) Created a conflict with another decision of this Court which was not addressed in the Panel's opinion.

In this case, the Panel held that constructive fraud could be premised only upon a false representation. Circuit Judge Hug, who sat on this Panel, also sat on the Panel which decided *In Re Mediscan Research, Ltd.*, 940 F.2d 558 (9th Cir. 1991). In that case, Circuit Judge Hug held that constructive fraud could be premised upon a false representation *or* upon concealments of material fact. The two decisions are, therefore, in direct conflict. Moreover, the Panel's mistake of law here runs contrary to the *agreed* jury instructions on the issue of constructive fraud submitted below, and contrary to the common and statutory law of Montana.

A rehearing *en banc* is necessary to correct the Panel's mistake, and to secure uniformity of intra-Circuit decisions. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987), *cert. denied* 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988) (Circuit Judge Hug participating); Rule 35(a), Federal Rules of Appellate Procedure.

Justice can be served only if this Petition and Suggestion for Rehearing *En Banc* is granted. If the members of

this Court will review the concealments of material fact ignored by the Panel, the Court will be astounded that this verdict was reversed.

STATEMENT OF THE CASE

For the benefit of those members of the Court who have no familiarity with this case, we briefly summarize the facts. For several years prior to 1981, Norwest Bank Kalispell (Bank) financed a feed and grain business owned by Lee Tower and known as Kalispell Feed and Grain Montana (KFG). By 1980, it was apparent KFG could not meet its debt obligations to the Bank. The KFG debt was entirely guaranteed by Farmers Home Administration (FmHA) and was secured by the KFG physical plant and equipment. KFG's inability to meet the debt load was troubling to the Bank, because the Bank was undersecured and considered the loan "bad". Tr. 99-100, 119. The evidence established that, had the Bank foreclosed at this time, it would have lost possibly $400-500,000. Tr. 130. Throughout 1980, FmHA advised the Bank to prepare liquidation plans and that foreclosure was imminent. Tr. 104, 216-217, 219-220; Exhibits 5, 6 and 13. In early 1981, John Martin, a building contractor from Arizona, entered the picture and expressed an interest in acquiring KFG for investment purposes only. Tr. 128-129, 162.

A series of negotiations between and among Martin, Tower and Norwest Bank ensued. These negotiations, and the critical material that the Bank withheld from Martin during negotiations, provide the framework for Martin's cause of action for constructive fraud.

Tower told the Bank to give Martin whatever information Martin needed. Tr. 247-248, 345. Tower then took a "back seat" in the negotiations and the Bank handled the transaction from that point forward. Tr. 251. In April of 1981, after he had acquired what he believed to be all the relevant information on the business within the Bank's knowledge, Martin agreed with the Bank to assume all of Tower's outstanding obligations. Tr. 248, 345 and 441. Martin also personally guaranteed the loans, and pledged significant collateral – his two personal homes – to secure the loans. Tr. 497-498. With Martin and his collateral on the line, the Bank was fully secured in the event of a loss. Tr. 130, 165 and 336.

Two years after Martin's acquisition of KFG, the Bank pulled Martin's line of credit, knowing this would topple the business. Tr. 166, 338-342. Martin injected nearly $700,000 cash trying to keep the business afloat before the Bank eventually foreclosed. Tr. 508, Exhibit 46. Martin sued the Bank for constructive fraud and negligent misrepresentation, and the Bank counterclaimed to collect the amounts owing under the Tower notes and guarantees that Martin had assumed in April of 1981.

In March of 1992, Martin's case was tried to a jury with the Honorable Charles L. Lovell, presiding. The jury found that Norwest Bank had engaged in negligent misrepresentation and constructive fraud in its dealings with Martin. District Judge Charles L. Lovell, in a strongly worded opinion, affirmed the jury's verdict when he denied the Bank's motion for judgment as a matter of law. (In fact, Judge Lovell had even permitted punitive damages to be submitted to the jury, but the jury declined to award them.)

The jury awarded Martin sufficient monies to satisfy or cancel out his obligations to the Bank, which, by 1992, totalled in excess of $2.8 million. In addition, the jury awarded compensatory damages representing Martin's investment in the failing business, and damages for emotional distress. On appeal, the Panel reversed and remanded the district court's verdict on the basis of insufficiency of the evidence, and directed the district court to enter judgment on behalf of the Bank.

ARGUMENT

The Panel dedicated only one page of its brief Memorandum opinion to plaintiffs' case for constructive fraud. The Panel summarily concluded:

> Because Martin failed to prove that Norwest made false representations, the evidence was insufficient to support his constructive fraud claim, and Norwest's motion [for judgment as a matter of law] should have been granted. Memorandum, p. 8.

The Panel's mistake of law caused it to ignore the agreed jury instructions on constructive fraud, as well as all of plaintiffs' evidence establishing concealments of material fact. The constructive fraud equation does not *require* a false representation. It is firmly established in Montana and this Circuit that omissions or concealments of material fact can form the basis of constructive fraud.

In the case of *In Re Mediscan Research, Ltd, supra*, a Panel of this Court, which included Circuit Judge Hug, *affirmed* the finding of constructive fraud entered by the Bankruptcy Appellate Panel. The appellant argued that

the finding of fraud should not stand because there was no evidence of any affirmative misrepresentations of fact. This Court disagreed, stating at pages 562-563:

> GE&T mischaracterizes the bankruptcy court's holding. The court found that GE&T actively participated in and assisted in defrauding and concealing the truth from Mediscan's limited partners. Thus, the fact that the officers of GE&T themselves did not make affirmative misrepresentations to the limited partners does not undermine the bankruptcy court's finding.
>
> In California, the intentional concealment of a material fact is an alternative form of fraud equivalent to direct affirmative misrepresentation. [*Citations omitted.*] . . . Under the California Civil Code, GE&T committed actual fraud by aiding APC in concealing material facts from the limited partners.

This Court upheld the common law of California, and affirmed that constructive fraud was properly premised upon the concealment of a material fact. In Montana, as in California, the concealment or omission of a material fact is also an alternative form of fraud equivalent to an affirmative misrepresentation.

Since this Court and Circuit Judge Hug upheld California's law and permitted omissions of fact in that State to form the basis of constructive fraud, this Court must afford the law of Montana the same deference. Plaintiffs' claim of constructive fraud must be analyzed in terms of omissions and concealments of material fact, and not solely on the basis of false representations, as the Panel did here.

The stipulated instructions given below on constructive fraud were:

> Constructive fraud consists of any breach of duty which without an actually fraudulent intent gains an advantage to the other person in fault or anyone claiming under him by misleading another to his prejudice or to the prejudice of anyone claiming under him. Constructive fraud occurs when a party to a transaction conceals from the other party material facts about the nature of the transaction.
>
> One who misleads another with intent to induce him to alter his position to his injury or risk is liable for any damages which he thereby suffers. Except as I will instruct you, where material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose known facts.
>
> A duty to disclose known facts arises where a party having knowledge of the facts is in a fiduciary or confidential relationship which imposes on him a duty of disclosure or where there are special circumstances. Neither KFG Arizona, Martin Construction, or the Martins had a fiduciary or confidential relationship with Norwest Bank.
>
> Plaintiffs cannot recover against Norwest Kalispell for constructive fraud unless they show that special circumstances existed which imposed on Norwest Kalispell a duty to disclose material facts which were not disclosed.
>
> Special circumstances creating a duty to disclose material facts which were not disclosed would

exist if Norwest Kalispell by its words or conduct created a false impression concerning serious impairments or other important matters regarding the financial condition or business of KFG Montana.

In order to establish a claim for constructive fraud, Plaintiffs have the burden of proving all of the following elements by a preponderance of the evidence:

(1) Norwest Kalispell by its words and conduct created in Plaintiffs a false impression concerning serious impairments or other important matters regarding the financial condition or business of KFG Montana.

(2) Plaintiffs did not know and had no reason to suspect the truth regarding such serious impairments or other important matters regarding KFG Montana.

(3) Norwest Kalispell failed to disclose information necessary to correct the false impression it had created concerning serious impairments or other important matters regarding KFG Montana.

(4) Norwest Kalispell gained a pecuniary advantage by its failure to disclose the information necessary to correct the false impression it had created concerning serious impairments or other important matters regarding KFG Montana.

(5) Through Norwest Kalispell's failure to disclose relevant information about KFG Montana, that Plaintiffs were justifiably induced to act or refrain from acting in a way they would not have if they had not had a false impression; and,

(6) Plaintiffs, as a result, sustained damage.

Tr. 992, L. 16 through Tr. 994, L. 23. No error was predicated on these instructions.

Norwest Bank's tendered instructions on constructive fraud were virtually identical to the instructions the court eventually gave. In support of its instructions, the Bank cited several Montana cases, as well as Section 551 of the Restatement of Torts, Second, as authority. The first case cited by Norwest in support of its instructions was *Moschelle v. Hulse*, 622 P.2d 155 (Mont. 1980). There, the Montana Supreme Court said:

> The defendants' statements cannot be excused simply because deliberate misstatements may not have been proven. The facts indicate a pattern of repeated concealments of the true state of affairs concerning the condition of the premises and probable business earnings. Withholding relevant facts concerning purchased property can be a fraudulent act. *See, Russell v. Russell* (1969), 152 Mont. 461, 452 P.2d 77. Furthermore, where a vendor by his conduct or words creates a false impression concerning a matter of vital importance to the purchaser, full disclosure of relevant facts may be required . . .
>
> Under the facts here, the defendants were under a duty to made [sic] such disclosures as would erase the false impressions created in the minds of the plaintiffs . . . *Id.* at 159.

The defendant also cited *Poulsen v. Treasure State Industries Inc.*, 626 P.2d 822, 829-830 (Mont. 1981), wherein the Supreme Court held that constructive fraud can be premised upon the withholding of information that a seller had about the business, which the buyer had no

reason to suspect. *Id.* at 828. In accord with *Poulsen* and *Moschelle, supra,* are *Mends v. Dykstra,* 637 P.2d 502, 506-509 (Mont. 1981), *Drilcon, Inc. v. Roil Energy Corporation, Inc.,* 749 P.2d 1058, 1061-1062 (Mont. 1988), and *Kitchen Krafters, Inc. v. Eastside Bank,* 789 P.2d 567, 573-574 (Mont. 1990), all of which were cited by Norwest Bank in support of its constructive fraud instructions. These cases hold that the giving of misleading information or half-truths, or the creation of a false impression concerning serious impairments of the business at issue, can constitute grounds for constructive fraud. It was from these cases that the agreed jury instruction on constructive fraud was gleaned.

The Montana Supreme Court recently reaffirmed these principles. In *Chor v. Piper, Jaffray & Hopwood Inc.,* 862 P.2d 26, 31 (Mont. 1993), the Montana Supreme Court stated:

> A prima facie case of actual fraud or constructive fraud would require, among other elements of proof, evidence that Piper misrepresented *or* omitted some material fact . . . In order for an omission, rather than an affirmative misrepresentation, to constitute fraud, the plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue. (Emphasis supplied.)

The foregoing case law – of Montana and this Circuit – demonstrates the clear error of the Panel's conclusion that only false representations can support a verdict of constructive fraud.

The jury was instructed that "special circumstances" could create a duty to disclose material facts if the Bank,

by its words or conduct, created a false impression concerning serious impairments or other important matters regarding the financial condition of KFG. Jury Instruction, paragraph 5. The parties below agreed that this question was one of fact to be resolved by the jury. The jury resolved that fact question in favor of Martin, finding that special circumstances existed which imposed on the Bank a duty to disclose material facts. No doubt the jury took into account the Bank's admission that this was not a typical lender-borrower situation. (Testimony of Bank Vice President Grell, Tr. 159-160.) Here, the Bank needed Martin to save it from a significant loss when the time came to foreclose on KFG. It used Martin to "shore up" its poor security position. (Testimony of Bank President Olson, Tr. 336).

THE MATERIAL FACTS WHICH WERE NOT DISCLOSED

Although the jury heard a lot of evidence which could support its verdict, two exhibits clearly establish the Bank's constructive fraud. Exhibit 42 was Bank President Olson's Letter of Intent of February 6, 1981. This letter was written with the understanding it would be given to Martin. Tr. 317. In this letter, the Bank indicated:

(a) That it would continue to pursue an $810,000 FmHA guaranteed loan which Martin could utilize once he acquired the business;

(b) That KFG could be viable, under proper conditions;

(c) That KFG could show a profit; and,

(d) That KFG needed a $500,000 capital injection.

Three weeks after Martin was given this letter, the Bank received bad news from the FmHA. On February 27, 1981, the FmHA advised the Bank:

(a) An $810,000 loan would not be extended, because KFG would still not have sufficient capital to sustain projected growth;

(b) KFG has not generated enough money to service such a load of term debt, and projections are completely unsupported historically, or by new evidence;

(c) KFG will never do what it has " . . . historically never done, that being to increase volume and profit to the point that it might sustain itself."

See, Exhibit 28. Bank Vice President Grell **admitted** at trial that this letter meant the FmHA's previous denial of the $810,000 loan application would stand. Tr. 137-140.

Exhibit 28 established two things: (1) that the FmHA would not extend the guaranteed loan that the Bank was assuring Martin it would continue to pursue, and, (2) the FmHA firmly believed that this business would *never* be viable. These dire observations directly contradicted the assurances contained in Exhibit 42, the Letter of Intent. Moreover, these dire observations proved prophetic.

The Bank chose never to tell Martin about Exhibit 28 or its contents. In March of 1981, a couple of weeks after it had received Exhibit 28, three Bank officers met with Martin. Knowing full well that the FmHA loan application for $810,000 would never be approved, the Bank

handed Martin an application for an $810,000 FmHA guaranteed loan, and assured him that approval of the loan would be coming soon, after Martin was on board. Tr. 492-494. Later, during subsequent meetings, the Bank advised Martin it would need to take mortgages on his two homes to secure his personal guarantees. Martin was assured, however, that these mortgages on his homes in Missoula and Phoenix would be temporary *only*, and would be released as soon as the FmHA loan came through. Tr. 503-504. These mortgages, in fact, were so important to the Bank that one of the bankers flew to Phoenix to evaluate Martin's Phoenix home and secure Martin's signature on the mortgages. Tr. 505-506. The Bank gave Martin the assurance that these mortgages were only temporary, all the while knowing that they would be permanent because the FmHA loan would never come through. Tr. 503-504, Exhibit 28.

The jury heard the Bank officers' pathetic attempts to explain why Exhibit 28 and other negative correspondence and comments between the Bank and the FmHA were not shared with Martin. (Martin did not discover these documents until 1989, after the Court issued a subpoena duces tecum.) One officer testified that the Bank couldn't release these documents to Martin because Martin was not a Bank customer. Tr. 162. He said the material was "a private matter." Tr. 155-156. When challenged, though, Bank President Olson admitted that Tower had indeed told the Bank to give Martin everything that it had. Tr. 345. Finally, during the Bank's case, Bank President Olson testified that the reason the Bank didn't give Martin the FmHA material was because Martin hadn't asked for it! Tr. 385-386. The jury was left to

wonder how Martin could have known to ask for the material when he never knew it existed.

Martin pledged his homes only on the Bank's express assurance that the mortgages were temporary. Tr. 503. Martin went into the transaction with the assurance that the FmHA loan would come through, once he was the business owner. He also went into the transaction equipped with the Bank's assurances that the business could be viable and could show a profit – assurances the Bank knew to be wrong.

There was much more evidence of concealments on the part of the Bank, but space constraints prevent a further examination of the evidence. This evidence alone, however, supports the verdict for constructive fraud. Each of the six elements of constructive fraud upon which the jury was properly instructed are clearly present:

(a) The Bank created a false impression regarding serious impairments concerning the financial condition of KFG (representations of viability, profitability, and financing);

(b) Martin did not know of the negative information from the FmHA because the Bank did not tell him it even existed;

(c) The Bank received information which was necessary to correct the false impression created by its letter of intent, but the Bank chose not to disclose it;

(d) The Bank gained a pecuniary advantage by failing to disclose the information necessary to correct the false impressions;

(e) Martin was justifiably induced to act in a way he would not have acted had he not had the false impression; and,

(f) Martin, as a result, sustained damage.

This case hinged upon the credibility of the witnesses. The jury found the credibility of the Bank witnesses lacking, as did the trial judge who affirmed the jury's verdict. The credibility of the witnesses and the weight of the evidence are issues for the jury to resolve. These issues are generally not the proper subject of appellate review. *Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992). The jury's verdict, when based upon substantial evidence as it was here, **must** be given deference by this Court.

We urge this Court to apply the proper law on constructive fraud – the same law upon which the jury below was instructed – to the facts of this case. If that is done, only one conclusion can be reached. That conclusion is that the plaintiffs' verdict must be affirmed.

CONCLUSION

Martin respectfully requests that this Court grant a rehearing *en banc*, that the Court vacate the Panel's opinion, and that the Court affirm the jury verdict. In the alternative, if the Court has some uncertainty about Montana's law on constructive fraud, the plaintiffs urge this Court to certify the question on constructive fraud to the Supreme Court of the State of Montana.

Respectfully Submitted this 2nd day of May, 1994.

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CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of May, 1994, I mailed two true and correct copies of the within and foregoing Appellees' Petition for Rehearing with Suggestion for Rehearing *En Banc*, postage prepaid, to each of the following counsel:

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